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Supreme Court of the United States

OCTOBER TERM, 1936.

No. [redacted] 32

IRON ROSS, as Receiver of the First National Bank of Perry, a corporation under the National Banking Laws,
Petitioner,

vs.

W. V. KNOTT, as Treasurer of the State of Florida; W. V. KNOTT, Treasurer of the State of Florida, as Ex Officio County Treasurer of Taylor County, Florida; DAVE SHOLTZ, as Governor of the State of Florida; J. M. LEE, as Comptroller of the State of Florida; TAYLOR COUNTY, a Political Subdivision of the State of Florida; and W. V. KNOTT, Treasurer of Florida, DAVE SHOLTZ, Governor of Florida and J. M. LEE, Comptroller of the State of Florida, as Members of and constituting the Board of Administration of the State of Florida,
Respondents.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

J. TURNER BUTLER,
Attorney for Petitioner.

GEORGE P. BARSE,
Attorney for the Comptroller of the Currency, of Counsel.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Respondents.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Iron Ross, as Receiver of the First National Bank of Perry, Florida, by direction of the Comptroller of the Currency, respectfully prays that a writ of certiorari issue to review the decree of the United States Circuit Court of Appeals for the Fifth Circuit in the above

captioned cause (R. ~~70~~ 73) entered on January 22, 1937, reported in 87 F. (2) 817.

I.

OPINIONS OF COURTS BELOW.

The opinion and order of the District Court are set out in the Record at pages 44 and 50 and are reported in 13 Fed. Supp. 963. The opinion of the Circuit Court of Appeals for the Fifth Circuit is found in the Record at page ~~70~~ 69 and is reported in 87 Fed. (2) 817.

II.

JURISDICTION.

The decree of the Circuit Court of Appeals to be reviewed was entered January 22, 1937 (R. [redacted] 73). Jurisdiction is conferred upon this Court to review this cause by writ of certiorari under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (U. S. C. Title 28, Section 347).

III.

SUMMARY STATEMENT.

The facts are not in controversy. The Receiver filed suit to set aside and have declared null and void certain pledges of assets made by the First National Bank of Perry, while a going concern, to secure various deposits of public money belonging to Taylor County, Florida, on the ground that said pledges of assets were made prior to the Enabling Act of June 25, 1930, c. 604, 46 Stat. 809; 12 U. S. C. 90, which act for the first time authorized national banks to give security for public deposits of a state or political subdivision. Said statute provides:

> "Any association may, upon the deposit with it of public money of a State or any political subdivision thereof, give security for the safekeeping and prompt pay-

ment of the money so deposited, of the same kind as is authorized by the law of the State in which such association is located in the case of other banking institutions in the State."

The First National Bank of Perry, Florida, was closed by the Board of Directors on October 18, 1930 (R. 6) and a Receiver was appointed by the Comptroller of the Currency on October 25, 1930 (R. 11). On March 12, 1930 the bank pledged with and delivered to W. V. Knott, Treasurer of the State of Florida, as County Treasurer Ex Officio of Taylor County, Florida, $10,000.00 par value County of Sarasota 5½% Highway Bonds as security for funds deposited (R. 7). On March 15, 1930, the bank also pledged with and delivered to said State Treasurer for a similar purpose $10,000.00 par value Town of Perry Bonds (R. 7). In 1929 and early in 1930 but not after May 2, 1930 the bank pledged with the Bond Trustees of Taylor County (the designation under which the account was carried prior to being taken over by the State Treasurer as County Treasurer Ex Officio of Taylor County), securities consisting of mortgages, notes and bonds having a face value of $69,549.76 for the purpose of securing deposits of the Bond Trustees of Taylor County, which were assigned to W. V. Knott, State Treasurer, as Ex Officio County Treasurer of Taylor County on May 2, 1930 (R. 8-25, 26). All of this last group of securities remained in the physical possession of the bank until after closing (R. 8) when the Receiver delivered to Knott a portion of said collateral consisting of the bonds covered by the assignment of May 2, 1930, having a face value of $20,250.00 (R. 9).

No new deposits of Taylor County funds and no additional pledges of assets to secure said deposits, were made after June 25, 1930.

Dividends in the sum of $13,318.03 representing dividends of 19 per cent on the deposits have been paid Knott as Ex Officio County Treasurer (R. 9-10). From collections made on the pledged collateral remaining in his hands, the Re-

ceiver paid Knott as Ex Officio County Treasurer of Taylor County $20,759.31 (R. 10). Knott has collected $2,025.00 in interest and $1,042.50 from the sale of a portion of the collateral in his hands (R. 10). Knott is still holding pledged assets having a face value of $39,250.00 (R. 11, 27, 28).

To prevent the threatened sale of the remaining pledged assets and the application of the proceeds toward payment of the claim and to recover the pledged assets or their proceeds, the Receiver filed suit in the District Court on December 9, 1935. Defendants filed motions to dismiss the bill of complaint (R. 30, 32, 35) which were granted by the District Court (R. 44-50). 13 F. Supp. 963. The District Court's order was affirmed by the Circuit Court of Appeals. 87 F. (2) 817 (R. [redacted] 73).

IV.

THE QUESTION PRESENTED.

Was the Act of June 25, 1930 retroactive in effect so as to render valid pledges of assets made prior to that date to secure public money deposits of Taylor County, it appearing that no new funds were deposited and no new pledges were made subsequent to the passage of said act?

V.

SPECIFICATION OF ERRORS.

The Appellate Court erred in holding that the passage of the amendment to Section 45 of the National Bank Act on June 25, 1930, validated pledges by national banks made before that date as security for deposits of public money of a state or political subdivision made prior to June 25, 1930.

The Appellate Court erred in not holding that the Act of June 25, 1930 could not be given a retroactive or retrospective operation in the absence of such an intention by the Legislature plainly expressed in the law.

The Appellate Court erred in not holding that a contract beyond the power of a corporation to make cannot be made valid by a change in law not in force when the transaction was consummated.

The Appellate Court erred in not holding that the law in force at the time a transaction is consummated determines its validity.

The Appellate Court erred in not requiring the respondents to participate in the pro rata distribution provided by the National Bank Act.

VI.

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

Petitioner believes that the writ of certiorari should be granted because:

(a) The decision of the Circuit Court of Appeals sustaining the validity of a pledge of assets made by a national bank before June 25, 1930, at a time when such banks could not legally pledge assets as security for public money deposits of a state or its political subdivisions, is in conflict with the principles applied by this Honorable Court in *Marion* v. *Sneeden,* 291 U. S. 262, 268, 269; *Texas & Pacific Railway Co.* v. *Pottorff,* 291 U. S. 245, 258, 259; *Lewis* v. *Fidelity & Deposit Company of Maryland,* 292 U. S. 559, 564, 570, 571. In the three decisions above mentioned, this Court held that a national bank prior to the amendment to Section 5153 of the Revised Statutes by said Act of June 25, 1930, could not legally pledge its assets as security for deposits of public money belonging to a state or its subdivisions.

(b) The court below has decided an important question of Federal law which has not been, but should be, settled by this Court.

In *Lewis* v. *Fidelity & Deposit Company of Maryland*, 292 U. S. 559, it appeared that although deposits had been made prior to the passage of the Act of June 25, 1930, nevertheless, at the time the bank closed, the balance then on hand consisted entirely of new deposits made subsequent to said Act of June 25, 1930, and under the circumstances the lien of the State, attaching under the Georgia statutes, as security for deposits, was held to be effective.

However, this Court explicitly refrained from passing upon the status of deposits, and the security for deposits, made prior to the passage of the act and in that connection said:

> "We have no occasion to consider whether the Act of June 25, 1930, would have validated the lien also in respect to deposits made before that date." (p. 571)

It is submitted that the foregoing question is now, in substance, presented to this court for decision for the first time.

There are now pending before the lower Federal Courts a number of suits involving secured deposits with insolvent national banks in which the question involved is the identical question raised in the instant suit. A determination of the validity of pledges made before the date of the Enabling Act of June 25, 1930 to secure deposits made before that date in cases where banks failed after the Act went into effect would be of great assistance to the Federal Courts in determining the pending suits now before them and would assist the Comptroller of the Currency from an administrative standpoint in determining the rights of secured creditors where assets were pledged by a national bank before June 25, 1930.

We submit that the correct doctrine is stated in the decision of the District Court of the United States,

District of Idaho, in the case of *Thompson* v. *Twin Falls Highway District,* 17 Fed. Supp. 705, 706, where it was held:

> "It is obvious that the deposits made prior to June 25, 1930, are the only ones concerned here, and as the bank could not then pledge its assets to secure them, the moneys when then deposited became a part of the common fund of the Commercial Department of the bank and were subject to the same risks as moneys of all other persons who made deposits in the bank and no act of the parties thereafter could have been done which would have retroactively converted the common character of the deposits into preferred or secured deposits when the claimed security was prohibited by law, and therefore they are incapable of being ratified."

In *Wood* v. *Imperial Irrigation District,* 17 Pac. (2) 128, 132, there was involved an analogous situation concerning the construction of a state statute which went into effect a few months before the state bank closed but after irrigation district funds had been deposited and secured by a pledge of assets. The new act in effect after the pledge and deposits were made and before closing of the bank, permitted the securing of such irrigation district funds and the question before the court was whether the original pledge contract was validated by the amendment to the depositary statute. The Supreme Court of California held that the original pledge was illegal, that the contract was not validated by the amendment to the depositary act, and a contract void because it stipulates for doing what the law prohibits, is incapable of being ratified. *The court further stated that the recognition of the contract for a long period after the act becomes legal does not constitute a ratification of the contract.* The pertinent portions of the opinion at page 132 thereof follow:

"We are of the view that the contract or agreement to pledge the bank's assets as security for the deposit made June 19, 1925, was illegal as an original transaction, being in contravention of section 21 of the Bank Act (as amended by St. 1913, p. 147) which declares that 'the capital and assets of any such bank are a security to depositors and stockholders, depositors having the priority of security over stockholders.' See, also, section 27 of the Bank Act (as amended by St. 1913, p. 151). The only manner in which the priority of one depositor may be secondary to the right of another depositor is by statutory enactment, which does not exist in favor of appellant under the law as it existed when it made its said deposits. The contract was not validated by the adoption of the act of July 29, 1927. At the time said moneys were deposited with the bank they became a part of the common fund of the commercial department of said bank, subject to the same risks as the moneys of all other persons who made deposits in said commercial department. The relationship of debtor and creditor was created. Prior to the security transaction herein appellant had actually made deposits with said bank for which no security was taken. No attempt was made to reaffirm, ratify, or bring the transaction within the purview of the act which became a law some two months and twelve days before the bank was taken over by the superintendent of banks, and no act could have been done by the parties to the transaction which would have retroactively converted the common character of said deposits into secured or preferred deposits. The funds had long since been disbursed through the commercial department as other depositors' funds had been disbursed. They were not then in the bank. *No deposits were made within the time in which the irrigation district was entitled to receive security for deposits, and only those bodies which made deposits and took security therefor under the express sanction of existing law were entitled to enjoy the extraordinary privilege provided by statute. A contract void because it stipulates for doing what the law prohibits is incapable of being ratified. The recognition*

of the contract for a long period after the act becomes legal does not constitute a ratification of the contract." (Italics inserted)

A contract of a corporation which is ultra vires and beyond the powers conferred upon it by the law-making body is not voidable but wholly void. The contract cannot be ratified by either party. No performance on either side can give the unlawful contract any validity or be the foundation of any right of action upon it. It is incapable of ratification by estoppel or otherwise. *Texas & Pacific Ry. Co.* v. *Pottorff*, 291 U. S. 245, 260; *California Bank* v. *Kennedy*, 167 U. S. 362, 371; *McCormick* v. *Market Nat. Bank*, 165 U. S. 538, 553; *Central Transportation Co.* v. *Pullman*, 139 U. S. 24, 59; *Granzow* v. *Village of Lyons* (C. C. A. 7th) decided March 23, 1937. Appendix page 14.

The law in force at the time a transaction is consummated determines its validity. A contract invalid when made is not rendered valid by a law in force thereafter. *Memphis Railroad* v. *Commissioners*, 112 U. S. 609, 623; *International Products Co.* v. *Vails Estate*, 123 Atl. 194, 197; *People* v. *Nixon*, 128 N. E. 245, 246 (New York).

In the case of *Harvey* v. *Tyler*, 69 U. S. 328, 347, the court holds:

> "And it is a rule of construction, that all statutes are to be considered prospective, unless the language is express to the contrary, or there is a necessary implication to that effect."

In the *U. S. Fidelity & Guaranty Co.* v. *United States*, 209 U. S. 306, 314, it is held:

> "There are certain principles which have been adhered to with great strictness by the courts in relation to the construction of statutes, as to whether they are or are not retroactive in their effect. The presumption is very strong that a statute was not meant to act retrospectively, and it ought never to receive such a construction if it is susceptible of any other. It ought not to

receive such a construction unless the words used are so clear, strong, and imperative that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied."

Where the pledge was ultra vires and void, the Receiver of a national bank may recover the pledged assets or their proceeds. *Marion v. Sneeden,* 291 U. S. 262, 272; *Texas & Pacific Railway Co.* v. *Pottorff,* 291 U. S. 245, 261; *O'Connor* v. *Rhodes,* 79 F. (2) 146, 152; *Webb* v. *American Surety Company* (C. C. A. 5th) 88 F. (2) 171, 174; *Granzow* v. *Village of Lyons* (C. C. A. 7th) decided March 23, 1937, Appendix pg. 14; *Ross* v. *Lee,* 15 F. Supp. 972, 974; *Mays* v. *Wilkinson,* 12 F. Supp. 350, 355.

Furthermore, if the pledges were invalid for want of power on the part of the bank to make, the delivery by the Receiver after closing of a portion of the pledged assets and the payment to the State Treasurer of proceeds derived from the collections made on the pledged assets after suspension of the bank by the Receiver, constituted a transfer of assets after the commission of an act of insolvency, in violation of the provisions contained in Section 5242 of the Revised Statutes (Appendix pg. 13) and such preferential transfers of assets may be recovered by the Receiver of the insolvent national bank. *Mechanics Universal Joint Co.* v. *Culhane,* 299 U. S. 51, 58.

The State Treasurer as Ex Officio County Treasurer of Taylor County was a common or general creditor of the bank, entitled only to dividends on his claim the same as any other creditor of the insolvent bank. *Texas & Pacific Railway Co.* v. *Pottorff,* 291 U. S. 245, 262; *Cook County National Bank* v. *United States,* 107 U. S. 445, 448, 449.

To sustain the pledges would be inconsistent with the provisions of the National Bank Act which are designed to insure in case of disaster uniformity in the treatment of depositors and a ratable distribution of assets. *Davis* v. *Elmira Savings Bank,* 161 U. S. 275, 287; *Cook County National Bank* v. *United States,* 107 U. S. 445, 448, 449.

VII.

CONCLUSION.

It is believed that the foregoing discussion and citation of authorities show that the decisions of the courts below were erroneous. In the interest of uniformity of decisions applicable to the administration of all insolvent national banks, and in order that the present doubt as to the correct rule of law to follow may be settled, it is urged that this Honorable Court entertain a review of this case on writ of certiorari.

Respectfully submitted,

J. TURNER BUTLER,
Attorney for Petitioner.

GEORGE P. BARSE,
Attorney for the Comptroller of the Currency, of Counsel.

APPENDIX.

Title 12 U. S. C. A., Sec. 194. (R. S. Sec. 5236)

DIVIDENDS ON ADJUSTED CLAIMS; DISTRIBUTION OF ASSETS. From time to time, after full provision has been first made for refunding to the United States any deficiency in redeeming the notes of such association, the comptroller shall make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction, and, as the proceeds of the assets of such association are paid over to him, shall make further dividends on all claims previously proved or adjudicated; and the remainder of the proceeds, if any, shall be paid over to the shareholders of such association, or their legal representatives, in proportion to the stock by them respectively held.

Title 12 U. S. C. A., Sec. 90. (R. S. Sec. 5153)

DEPOSITARIES OF PUBLIC MONEYS AND FINANCIAL AGENTS OF GOVERNMENT. All national banking associations, designated for that purpose by the Secretary of the Treasury, shall be depositaries of public money, under such regulations as may be prescribed by the Secretary; and they may also be employed as financial agents of the Government; and they shall perform all such reasonable duties, as depositaries of public money and financial agents of the Government, as may be required of them. The Secretary of the Treasury shall require the associations thus designated to give satisfactory security, by the deposit of United States bonds and otherwise, for the safekeeping and prompt payment of the public money deposited with them, and for the faithful performance of their duties as financial agents of the Government: Provided, That the Secretary shall, on or before the 1st of January of each year, make a public statement of the securities required during that year for such deposits. And every association so designated as receiver or depositary of the public money shall take and receive at par all of the national currency bills, by whatever association issued, which have been paid into the Government for internal revenue, or for loans or stocks: Provided, That the Secretary of the Treasury shall distribute

the deposits herein provided for, as far as practicable, equitably between the different States and sections.

Any association may, upon the deposit with it of public money of a State or any political subdivision thereof, give security for the safekeeping and prompt payment of the money so deposited, of the same kind as is authorized by the law of the State in which such association is located in the case of other banking institutions in the State. (Act of Mar. 3, 1901, c. 871, 31 Stat. 1448; Mar. 4, 1907, c. 2913, Sec. 3, 34 Stat. 1290; Dec. 23, 1913, c. 6, Sec. 27, 38 Stat. 274; Aug. 4, 1914, c. 225, 38 Stat. 682; June 25, 1930, c. 604, 46 Stat. 809).

Title 12 U. S. C. A., Sec. 91. (R. S. Sec. 5242)

TRANSFERS BY BANK AND OTHER ACTS IN CONTEMPLATION OF INSOLVENCY. All transfers of the notes, bonds, bills of exchange, or other evidences of debt owing to any national banking association, or of deposits to its credit; all assignments of mortgages, sureties on real estate, or of judgments or decrees in its favor; all deposits of money, bullion, or other valuable thing for its use, or for the use of any of its shareholders or creditors; and all payments of money to either, made after the commission of an act of insolvency, or in contemplation thereof, made with a view to prevent the application of its assets in the manner prescribed by this chapter, or with a view to the preference of one creditor to another, except in payment of its circulating notes, shall be utterly null and void; and no attachment, injunction or execution, shall be issued against such association or its property before final judgment in any suit, action, or proceeding, in any State, county, or municipal court.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 6027. October Term, 1936, January Session, 1937.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

CARL L. GRANZOW, Receiver of the First National Bank of Riverside, Illinois, *Appellant*,

vs.

THE VILLAGE OF LYONS, ILLINOIS, *Appellee*.

March 23, 1937.

Before Sparks, *Circuit Judge*, and Lindley and Baltzell, *District Judges*.

Lindley, *District Judge*. Appellant, receiver of a national bank, sued to recover from appellee, an Illinois municipal corporation, $17,000, representing the difference between the proceeds realized by appellee from a sale it made of certain assets of the bank which had been pledged to it to secure a deposit of municipal funds and the dividend to which appellee would have been entitled on its claim for such deposit as a general creditor. The court allowed appellee's motion to dismiss the suit, and this appeal followed.

The Bank, prior to 1932, received a deposit of municipal funds, pledging with appellee, at the latter's insistance, certain assets to secure the deposit. The bank became insol-

vent and suspended payment June 27, 1932. Appellant was thereupon appointed receiver. The deposit of appellee was then $39,323.

In due course of administration, both the receiver and the municipality, under a misapprehension of the law, agreed that the municipality might sell the collateral and apply the proceeds of the sale upon the debt. The comptroller of the currency approved this agreement subject to approval by the District Court. Appellant thereupon filed his petition and secured an order authorizing sale of said assets as agreed. The sale was had and application of the proceeds made on the debt.

Sometime thereafter the parties awoke to the fact that these transactions had taken place under a mutually mistaken view of the law. This court in *Sneeden* v. *City of Marion,* 64 F. (2d) 721, held that in Illinois a national bank does not have the power to pledge its assets to secure a deposit of public money; that such pledges are *ultra vires,* void and recoverable at the suit of the receiver. On certiorari granted, the Supreme Court affirmed, 291 U. S. 262. This suit was instituted subsequent to this adjudication of the law in this manner.

Under the authorities cited, the pledge was *ultra vires.* This proposition the receiver has a right to assert. Nor is the receiver required to make restitution by paying the claim in full. The pledge fails because illegal and void and the creditor becomes entitled only to a dividend as a general creditor. *Texas & Pacific R. R.* v. *Pottorff,* 291 U. S. 245. Being void the transaction could not be confirmed, ratified, enforced or rendered enforcible by the application of any doctrine of estoppel or otherwise. *California Bank* v. *Kennedy,* 167 U. S. 362; *McCormick* v. *Market Bank,* 165 U. S. 538; *Central Transportation* v. *Pullman,* 139 U. S. 24. This is because, not merely that the bank ought not to make the contract, but that it could not legally make it. Ratification is impossible if there is no power to contract. *Central Transportation* v. *Pullman,* 139 U. S. 24. And knowledge

of the lack of existence of authority is conclusively presumed. *McCormick* v. *Market Bank,* 165 U. S. 538.

The receiver was the agent and administrative officer of the United States. *In re Chetwood,* 165 U. S. 443; *U. S.* v. *Weitzell,* 246 U. S. 533. Payments voluntarily made by officers of the United States, under a mistake of law, may be recovered. Thus where the Postmaster General, through a mistake as to the statutory law relative to payment for carrying the mails, overpaid the railroad company, which later sued for moneys due for services subsequently rendered, and the Postmaster General sought to set off the previous overpayment, made under mistake of law, the Supreme Court affirmed recovery, holding that the government cannot be bound by the actions of its officers under misconception of the law under which they have assumed to act, and that the question, in such instances, is whether the recipient may be allowed to retain the fruits not authorized by law, resulting from an erroneous conclusion by the agent of the government as to the legal effect of the particular statute, under or in reference to which he is proceeding, saying:

> "there is nothing on this record to take the case out of the scope of the principle that parties receiving moneys illegally paid by a public officer are liable *ex aequo et bono* to refund them." *Wisconsin Central R. R. Co.* v. *U. S.,* 164 U. S. 190.

See also *Talcott* v. *United States,* 23 F. (2d) 897; *Champ Spring Co.* v. *U. S.,* 38 F. (2d) 988, affirmed 47 F. (2d) 1.

Such payments are exceptions to the rule that money paid under mistake of law cannot be recovered. A private party may do as he desires with his own money, but an officer of the United States cannot bind his government in making payments contrary to law. *Heidt* v. *United States,* 56 F. (2d) 559. It follows, therefore, that appellant as receiver had a right to sue and recover what he had illegally paid under a mistake of law.

But it is said that the preferential payments had been made at the instance and with the approval of the comptroller. This in no wise alters the situation. In *Wisconsin Central R. R.* v. *U. S., supra,* the Supreme Court held the Postmaster General included within the class of those whose wrongful payment may be recovered. There is no reason why the comptroller should have any greater power to bind the government by approving a payment contrary to law. Such was the reasoning of the court in *O'Connor* v. *Rhodes,* 79 F. (2d) 146 (C. C. A.). There the previous payments were recovered, although they had been made at the instance and with the approval of the comptroller. The Supreme Court affirmed in 297 U. S. 383. A similar recovery was allowed in *Mays* v. *Wilkinson,* 12 F. Sup. 350. There was and there could have been no estoppel as to either the receiver or the comptroller which would work a binding effect upon the payment of money made by them as United States officers under misapprehension of the law.

It is asserted, however, that the complaint discloses that the payment was approved by the District Court. The language of the complaint in this respect is "that an order was duly entered in this court upon petition of plaintiff praying entry of said order authorizing sale of said assets." There is no showing that at that time the court had jurisdiction of any person other than the receiver or that it was dealing with anything other than an *ex parte* proceeding. The burden of defense is upon appellee; the trial court was bound to accept the averments of the complaint, construed most favorably toward appellant. The complaint discloses no adjudication as such between the parties and we cannot assume that an order of the court entered upon a petition of the receiver was one entered wherein appellee was a party and bound within the meaning of the doctrine of *res adjudicata,* until it appears that the parties were in court. There is no suit in the legal sense and no parties in the legal understanding of the term in such an *ex parte* proceedings,—no adjudication of issues between adversaries. Rather, under

the language of the complaint, we must assume that the receiver's petition was one such as is ordinarily utilized in procuring authorization of administrative actions by the receiver. No issue was adjudicated. 34 C. J. 763; *Kelly* v. *Milan*, 127 U. S. 139; *Fifer* v. *Williams*, 5 F. (2d) 286 (C. C. A. 9); *Hulse* v. *Argetsinger*, 18 F. (2d) 944 (C. C. A. 2); *Texas & Pacific* v. *Southern Pacific*, 137 U. S. 48. The order was the consequence of consent and not of judgment by the court. Consequently it could not be treated as *res adjudicata*. *Lawrence Manufacturing Co.* v. *Janesville Cotton Mills*, 138 U. S. 532; *San Francisco* v. *LeRoy*, 138 U. S. 656.

It follows that the complaint of the receiver, as an officer of the United States, for the recovery of money paid under misapprehension and misapplication of the statutory law, was sufficient. The motion to dismiss should have been denied. The judgment is reversed with directions to proceed in harmony with the views herein expressed.

A true Copy:
Teste:

FREDERICK G. CAMPBELL,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.